Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
TARIFFS IMPLEMENTING ACCESS CHARGE REFORM	)	**CC DOCKET NO. 97-250** **CCB/CPD NO. 98-12**

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION
IN SUPPORT OF
EMERGENCY PETITION FOR PRESCRIPTION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to *Public Notice*, DA 98-385 (released February 26, 1998), hereby submits the following comments in support of the Emergency Petition for Prescription ("Petition") filed in the captioned proceeding on February 24, 1998, by MCI Telecommunications Corp. ("MCI"). In its Petition, MCI urges the Commission to "revisit and significantly modify its Access Reform policies by July 1, 1998."[1] Most fundamentally, MCI recommends that access charges be immediately reduced to the forward-looking economic cost of originating and terminating interstate communications and that incumbent local exchange carriers ("LECs") be required to recover presubscribed interexchange carrier charges ("PICCs") directly from end users, rather than from interexchange carriers ("IXCs"). More immediately, MCI advocates the immediate prescription by the Commission, pursuant to Sections 4(i), 4(j), 201(b), 203(b), 204(a), 205 and 403 of the

[1] MCI Petition at 2

Communications Act of 1934, as amended,[2] of "key rate levels, terms, and conditions in the pending tariff investigation,"[3] and the imposition on incumbent LECs of a requirement that the amount of universal service support contributions being passed-through to individual IXCs be detailed.

TRA urges the Commission to grant not only the immediate relief requested by MCI, but to address the more fundamental issues MCI has raised regarding the adverse competitive and financial impacts of the Commission's well-intended, but no longer soundly-based, access charge reforms. As TRA has emphasized in other filings made with the Commission, access charge reform has proven to be an unmitigated disaster for non-facilities-based resale carriers (and to a lesser degree, for partially "switch-based" resale carriers). because the limited access charge reductions that have resulted from these reforms have not been promptly passed through to non-facilities-based resale carriers, resulting in dramatic cost increases (in the form of PICCs and levies for universal service support) for these generally small to mid-sized providers.[4] Moreover, the competitive

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[2] 47 U.S.C. ¶¶ 154(i), 154(j), 201(b), 203(c), 204(a), 205 and 403.

[3] Id. Specifically, MCI urges the Commission to (i) eliminate the distinctions between primary and non-primary lines; (ii) transfer to incumbent LECs the responsibility for collecting PICCs until such time as they can timely provide all data necessary to permit IXCs to recover these charges; (iii) adopt a standard, independently-verifiable definition of primary and non-primary lines; (iv) require incumbent LECs to timely provide detailed, categorized and auditable line-count data; (v) promptly issue a declaratory ruling that an IXC that has terminated service to a presubscribed customer for non-payment or other tariff violations and timely notified the incumbent LEC of such termination is not responsible for payment of the PICCs associated with the customers lines; and (vi) establish a uniform "snap-shot date" for determining responsibility for payment of PICCs.

[4] Fortunately, wholesale rates have of late begun to decline (often by significant percentages), reflecting reductions in access charges experienced last summer and at year's end by facilities-based providers. While this turn of events is welcomed, it unfortunately does not remedy the adverse competitive and financial impact of the failure of facilities-based providers to immediately pass-through access charge reductions to all of their resale carrier customers. As

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damage wrought by the Commission's current access charge regime will be greatly exacerbated as additional incumbent LECs enter the "in-region," interLATA market. As the Commission has recognized, interstate access charges remain grossly inflated[5] and under the Commission's market-based approach, will only be driven toward economic cost by pervasive facilities-based exchange access competition.[6] Unfortunately, rulings by the U.S. Court of Appeals for the Eighth Circuit have significantly diminished the prospects for facilities-based exchange access competition in the foreseeable future, leaving incumbent LECs free to charge inflated rates for exchange access to the competitive and financial detriment of competitive providers of interexchange service within the incumbent LECs' "in-region" service areas.

[footnote continued from preceding page]

TRA has explained, non-facilities-based resale carriers generally purchase from their underlying interexchange network service providers at fixed usage-sensitive rates -- *i.e.*, X¢ per minute -- end-to-end service, which incorporates not only inter-city carriage, but exchange access as well. Such end-to-end service is generally purchased pursuant to extended term contracts, which given the disparity in bargaining power, generally provide for the "pass-through" of new governmental levies, as well as new or increased assessments by exchange access providers, but seldom require a like pass-through of decreases in access costs. Accordingly, unless underlying network service providers are required to immediately pass through access charge reductions to their resale carrier customers, non-facilities-based resale carriers will continue to be disadvantaged competitively and financially during the lag in time before contract renewal and renegotiation -- *i.e.*, the remaining one, two, three or more years of their existing contract terms.

[5] Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158, ¶ 44 (1997), *recon.* 12 FCC Rcd. 10119 (1997), *second recon.* CC Docket No. 96-262, FCC 97-368 (Oct. 9, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997), *pet. for rev. pending* AT&T v. FCC, Case No. 98-1555 (and consol. cases) (8th Cir. Jan. 1998) (recognizing that the prescriptive measures taken represent only "the first step toward our goal of removing implicit universal service subsidies from interstate access charges and moving such charges toward economically efficient levels.").

[6] Id. at ¶ 265.

When the Commission adopted "a market-based approach to reducing interstate access charges," it believed that "emerging competition . . . [would] provide a more accurate means of identifying implicit subsidies and moving access prices to economically sustainable levels."[7] While acknowledging that "a market-based approach . . . may take several years to drive costs to competitive levels," the Commission nonetheless concluded that "where competition is developing, it should be relied upon in the first instance to protect consumers and the public interest."[8] In so concluding, however, the Commission assumed that "rates for interstate access services . . . [would] generally move toward the forward-looking economic cost of providing such services in response to increased competition in local exchange and exchange access markets."[9] And this competition, the Commission anticipated, would emerge "because Congress established in the 1996 Act a cost-based pricing requirement for incumbent LECs' rates for interconnection and unbundled network elements, which are sold by carriers to other carriers."[10] As the Commission explained, "interstate access services can be replaced with some interconnection services or with the functionality offered by unbundled network elements."[11]

In so holding, the Commission could not have foreseen that the U.S. Court of Appeals for the Eighth Circuit would relieve incumbent LECs of the responsibility to provide "assembled platform(s) of combined network elements (or any lesser existing combination of two or more

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7 Id. at ¶ 44.

8 Id.

9 Id. at ¶ 265.

10 Id. at ¶ 262.

11 Id.

elements)," effectively licensing them to disassemble such platforms and combinations for the sole purpose of rendering competitive entry through use of unbundled network elements more costly and complex.[12] As the Commission has recognized. "the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market."[13] Moreover, the Commission clearly did not foresee the lengths to which incumbent LECs would go both in the marketplace and in the courts to resist competitive entry into the local market. And the Commission could not have contemplated that various Bell Operating Companies would challenge in a Federal District Court in northern Texas the constitutionality of legislation they helped to enact.[14]

Two years have now passed since enactment of the Telecommunications Act of 1996 and the facilities-based competition the Commission anticipated would drive interstate access charges toward cost has yet to emerge. Incumbent LECs continue to control roughly 99 percent of local markets[15] and what competition exists is generally provided through resale,

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[12] Iowa Utilities Board v. FCC, 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997).

[13] Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418, ¶ 195 (released Dec. 24, 1997).

[14] SBC Communications, Inc., et al. v. FCC, et al., Civil Action No. 7-97-CV-163-X (N.D.Tex. Feb. 11, 1998), *stay granted* (Feb. 11, 1998), *appeal pending sub nom.* FCC v. SBC Communications, Inc., Case No. 88-10140 (5th Cir. Feb. 11, 1998).

[15] See, e.g., Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418 at ¶ 22 ("We recognize that local competition has not developed in South Carolina and other states as quickly as many had hoped.

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which does not implicate exchange access.[16] The effectiveness of using unbundled network elements as a market entry strategy has been essentially gutted by the U.S. Court of Appeals for the Eighth Circuit. At a minimum, the Court's ruling that existing combinations of network elements may be disassembled before delivery to new entrants has increased both the cost and complexity of this entry strategy, rendering it far less likely to provide the prompt competitive impetus anticipated by the Commission. As the Commission has recognized, "given the practical difficulties of requiring

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. . . [T]he Department of Justice estimates BellSouth's market share of local exchange in its service area in South Carolina is 99.8% based on access lines"). The U.S. Department of Justice ("Justice Department") estimated that in the State of Louisiana, "actual competitive entry . . . is still extremely limited; BellSouth's market share of local exchange in its service area is about 99.61% based on access lines." TRA has explained, non-facilities-based resale carriers generally purchase from their underlying interexchange network service providers at fixed usage-sensitive rates -- *i.e.*, X¢ per minute -- end-to-end service, which incorporates not only inter-city carriage, but exchange access as well. Such end-to-end service is generally purchased pursuant to extended term contracts, which given the disparity in bargaining power, generally provide for the "pass-through" of new governmental levies, as well as new or increased assessments by exchange access providers, but seldom require a like pass-through of decreases in access costs. Accordingly, unless underlying network service providers are required to immediately pass through access charge reductions to their resale carrier customers, non-facilities-based resale carriers will continue to be disadvantaged competitively and financially during the lag in time before contract renewal and renegotiation -- *i.e.*, the remaining one, two, three or more years of their existing contract terms. 99.61% based on access lines." Evaluation of the Justice Department filed in CC Docket No. 97-231, Appx. B, p. 3 on December 10, 1997. In Ameritech's "in-region State" of Michigan, the Justice Department calculated that "the aggregate market share of CLECs, measured by total number of access lines statewide using all forms of competition (separate facilities, unbundled loops and resale), appears to be between 1.2% and 1.5%." Evaluation of the Justice Department filed in CC Docket No. 97-137, Appx. B, p. 3 on June 25, 1997.

[16] Consumer Federation of America, Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996, 15 - 16 (January, 1998) ("Restricting ourselves even to New York, we find that competition has gained a 3 percent market share, primarily in the business sector and at most 1 percent in the residential sector. This is overwhelmingly resale competition. Facilities-based competition, even in New York, is barely large enough to be considered rounding error.").

requesting carriers to combine elements that are part of the incumbent LEC's network," new market entrants are "seriously and unfairly inhibited in their ability to use unbundled elements to enter local markets" by incumbent LEC disassembly of existing combinations of network elements prior to delivery to requesting carriers.[17]

Incumbent LECs continue to resist competitive entry in the marketplace, as well as before the Commission and in the Courts.[18] None of the Bell Operating Companies ("BOC") that have sought authority to provide in-region, interLATA service have fully complied with the 14-point competitive checklist designed to evidence elimination of economic and operational barriers to entry into the local market. And there is no indication that widespread facilities-based competition can or will emerge on a widespread level absent greater cooperation by incumbent LECs. Indeed, among the deficiencies identified by the Commission in BOC Section 271 applications are "ones which . . . are likely to frustrate competitors' ability to pursue entry through the use of unbundled network

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[17] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 293 - 94 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom* AT&T Corp. v. Iowa Utilities Board (Nov. 17, 1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

[18] As the Commission has repeatedly found, incumbent LECs still do not provide to competing carriers nondiscriminatory access to their operations support systems ("OSS"). *See, e.g.*, Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418 at ¶¶ 14 - 19, 82 - 181. Likewise, the Commission has found that incumbent LECs do not offer nondiscriminatory access to unbundled network elements in a manner that permits competing carriers to combine them. *See, e.g.*, Id. at ¶¶ 182 - 209.

elements or resale, the two methods of entry that promise the most rapid introduction of competition."[19]

It is now abundantly clear that the Commission's market-based approach will not drive costs to competitive levels in "several years."[20] TRA agrees with MCI that "without widespread availability of UNEs priced at forward-looking economic cost and available in combinations competitive entry cannot occur fast enough to put downward pressure on ILEC access rates in the foreseeable future."[21] The Commission anticipated just such an eventuality and committed to take prescriptive action "to ensure that all interstate access customers receive the benefits of more efficient prices, even in those places and for those services where competition does not develop quickly."[22] While it initially concluded that "it would be imprudent to prejudge the effectiveness of . . . ['the pro-competitive regime created by the 1996 Act, and implemented in the *Local Competition Order* and numerous state commission decisions'] at creating competitive local markets,[23]" the Commission could not have anticipated in so holding the actions of the U.S. Court of Appeals for the Eighth Circuit. There is no point in waiting for "emerging competition to affect access charge rate levels"[24] when no meaningful exchange access competition has yet taken root. Prescriptive action should be taken now, not in the year 2001.

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19 Id. at ¶ 14.

20 Access Charge Reform, CC Docket No. 96-262, FCC 97-158 at ¶ 44.

21 MCI Petition at 6.

22 Access Charge Reform, CC Docket No. 96-262, FCC 97-158 at ¶ 267.

23 Id. at ¶ 269.

24 Id.

TRA also agrees with MCI that in the interim per-prescription period, the Commission should take certain steps to alleviate some of the more problematic mechanical problems associated with access charge reform. As MCI correctly notes, the inability of incumbent LECs to provide IXCs with timely and accurate data regarding numbers and types of customer lines, as well as universal service support collected through interstate access charges, places IXCs, particularly small to mid-sized IXCS, in an untenable position. Small to mid-sized carriers which are not timely receiving the benefits of the access charge reductions driven by access charge reform, but are nonetheless compelled by market forces to price-compete with carriers whose access costs have declined, have no choice but to pass through PICCs and universal service support contributions. Without timely and accurate line counts and descriptions, these carriers are essentially required to guess which PICCs and universal service levies are associated with which customers. The adverse financial and competitive ramifications of an erroneous estimate are obvious.

MCI's proposals would mitigate these more immediate concerns. Certainly a common definition of primary and non-primary lines would alleviate one element of confusion, while the timely availability of data reflecting by customer the number and types of lines presubscribed to an IXC would eliminate another key impediment to accurate and timely billing. Incomplete and inaccurate data obviously render customer billing a nightmare; data delivered one, two or three months late, render billing impossible. If an incumbent LEC cannot timely deliver accurate and complete line counts and categorizations, it should not be able to bill the associated PICCs.

TRA agrees with MCI that current incumbent LEC "PICC billing practices . . . make it impossible for IXCs to develop accurate residential rates that reflect the distinction between

primary and non-primary lines, and business rates that reflect the distinction between multi-line and single-line [much less Centrex] business lines."[25] MCI has it right; "ILECs should not be permitted to collect the PICC from the IXCs through current charges until they can provide . . . [timely, accurate and complete] PICC billing information."[26] In such circumstances, incumbent LECs should be made to collect the PICC directly from end users and should be required to continue to do so until they are capable of providing accurate and complete data in a timely manner.

TRA also joins with MCI in urging, as TRA did in its comments in support thereof,[27] the Commission to promptly grant Sprint Corporation's ("Sprint") Petition for a declaratory ruling that an IXC which has terminated service to a presubscribed customer for non-payment or other tariff violations and timely notified the incumbent LEC of such termination is not responsible for payment of the PICCs associated with the customer's lines. Prescription of tariff language requiring incumbent LECs to de-PIC such customers when so notified by an IXC would remedy yet another current mechanical problem.

Other recommendations proffered by MCI likewise make eminent sense. Establishing a common "snap-shot date" for determining which lines are presubscribed to which IXC will minimize the potential for double billing. Itemization of universal service support levies by incumbent LECs would allow for more accurate apportionment of universal service support obligations. Audit mechanisms would reduce the frequency, and facilitate easier and quicker

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[25] MCI Petition at 21 - 22.

[26] Id. at 22.

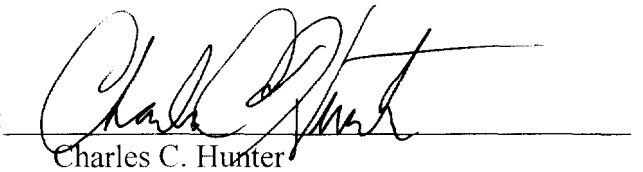
[27] Comments of the Telecommunications Resellers Association in Support of Petition for Declaratory Ruling, filed in CCB/CPD No. 98-2 on Feb. 10, 1998.

resolution, disputes over PICCs, although such audit requirements should be extended not only to incumbent LECs, but to IXCs that provide wholesale services.

By reason of, and consistent with, the foregoing, the Telecommunications Resellers Association urges the Commission to grant the Emergency Petition for Prescription filed by MCI Telecommunications Corp., and revisit its access charge reforms in light of subsequent, unanticipated events. In the interim, the Commission should grant the more immediate relief requested by MCI, thereby alleviating some of the more problematic mechanical problems associated with access charge reform.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

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